

Luu (Migration) [2020] AATA 85 (10 January 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thi Tu Luu
CASE NUMBER:	1716838
DIBP REFERENCE(S):	CLF2017/23250 CLF2017/25980
MEMBER:	P. Maishman
DATE:	10 January 2020
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2)(c) of Schedule 2 to the Regulations

Statement made on 10 January 2020 at 11:50am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine spousal relationship – natural affection and comfort provided by the parties to each other – financial aspects – money transfers – household arrangements – social aspects – nature of commitment – married for more than nine years – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 July 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant, Ms Thi Tu Loan Luu (the applicant), applied for the visa on 8 May 2013 on the basis of her relationship with her sponsor, Mr Quang Son Le (the sponsor). At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2)(c) because the delegate was not satisfied the applicant is the spouse or de facto partner of the sponsoring partner.
5. The applicant appeared before the Tribunal on 2 May 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal was assisted by an interpreter of the Vietnamese and English languages.
6. The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The applicant is a national of Vietnam born on 1 January 1977. She was granted the temporary visa on the basis of her relationship with the sponsor on 21 May 2013.
9. The Department requested documentation for the grant of the residence visa in March 2015. In March 2017 the delegate conducted a telephone interview with the applicant. The delegate was concerned that statutory declarations provided by the applicant and the sponsor on 2 June 2015 were worded almost identically; that the applicant's evidence about her finances with the sponsor was evasive and inconsistent; that the applicant knew little of her husband's background or her engagement and wedding details; that she was uncertain about the names of her husband's immediate family; and that the applicant was unable to recite her earlier addresses.
10. The Tribunal had before it copies of the Department's files.
11. The applicant gave the Tribunal a copy of the delegate's decision record. The applicant provided additional information to the Tribunal that was not before the Department, including:
 - a. money transfer receipts;
 - b. statutory declarations from witnesses;
 - c. additional photographs;
 - d. correspondence addressed to the parties;

- e. various bank account statements;
 - f. receipts for purchases; and
 - g. a submission prepared by the applicant's representative.
12. The Tribunal notes the concerns of the Department's delegate. The Tribunal has had the opportunity to observe the interaction of the applicant and sponsor during the hearing process. The parties presented as somewhat anxious, however the interaction between them was natural and affectionate. The Tribunal was persuaded that the affection and comfort shown by the applicant and sponsor to one another was not confected for the Tribunal's benefit. The Tribunal attributes weight to the natural affection and comfort provided by the parties to each other.
 13. The issue in the present case is whether the applicant is the spouse of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

14. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who was granted Australian citizenship on 24 February 1998 and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal's file contains a certified copy of a marriage certificate signed by the Registrar of Births, Deaths and Marriages, Perth, Western Australia. The applicant and the sponsor married in October 2012. There is no evidence to suggest the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

17. The Tribunal considered the matters in r.1.15A(3).
18. The Tribunal considered the financial aspects applicant and sponsors relationship.

19. The applicant and sponsor are partners together in a share farming enterprise. The applicant gave evidence that she handles all the banking. Their salaries credited to their joint account and the applicant transfers money to a separate account to limit the sponsor's access to their joint funds. When necessary she filters money back to the joint account. The applicant said the sponsor has a history of gambling and her control of the accounts ensures she can pay the bills. Evidence provided to the Tribunal shows the sponsor transfers regular amounts to Than Mong Thuy in Vietnam. The applicant and sponsor gave consistent evidence that this was paid to the applicant's sister-in-law who looked after the applicant's mother. The applicant and sponsor, to support their enterprise have purchased a tractor and a number of vehicles together.
20. The Tribunal acknowledges the Department's concern that the applicant was evasive when questioned about her finances. The applicant showed the Tribunal how she transferred funds using her mobile phone. The Tribunal accepts that the applicant's explanation that she did not mean to misinform the Department that her husband was present when she was being questioned and she was uncomfortable explaining that his misuse of their income was essentially the reason their bank accounts were complicated.
21. The Tribunal accepts the applicant and sponsors evidence, supported by documentary evidence, that they have a long-term involvement in vegetable growing as a partnership. They share their physical resources to do the work and equally share the profits as demonstrated by their partnership income tax return.
22. The Tribunal is satisfied that the applicant and sponsor have joint ownership of assets in their business partnership and related business assets. They have joint liabilities in respect of assets purchased for the business and they pool their financial resources and share day-to-day household expenses. The applicant and sponsor have a legal obligation owed to each other in respect of their business partnership.
23. The Tribunal is satisfied that the financial aspects of the applicant and sponsors relationship are indicative of a couple in a marriage relationship.
24. The Tribunal considered the nature of the applicant and sponsor's household.
25. The applicant and sponsor gave consistent verbal evidence about their household arrangements. They do not have the cares of any minor children. They share a bedroom together and the living area of a four bedroom house with another couple. They pay rent for the premises. The applicant does the cooking and the sponsor washes the dishes. They eat together. In the morning the sponsor makes the applicant coffee and they go together to their farm to tend to their crop.
26. The Tribunal is satisfied that the parties live together and share the housework as a couple.
27. The Tribunal finds the nature of the applicant and sponsors household is indicative of a couple in a marriage relationship.
28. The Tribunal considered the evidence about the social aspects of the applicant and sponsors relationship.
29. Photographs presented to the Tribunal show the applicant and sponsor at various social occasions with friends and family. Statutory declarations provided by previous employers, neighbours and friends all support that the applicant and sponsor have an enduring relationship and are known in the community to be married to one another. The declarant's attest to the hard work the applicant and sponsor jointly do to build a life together in Australia.

30. The applicant and sponsor were consistent in their description of what they like to do when they are not working.
31. The Tribunal is satisfied the social aspects of the applicant and sponsors relationship are indicative of a couple who are in a marriage relationship.
32. The Tribunal considered the nature of the applicant and sponsors commitment to each other.
33. The applicant and sponsor have been married to one another for more than nine years. They have lived together and worked together for the duration of the relationship. They are jointly committed to the success of their farming enterprise and intend to continue farming and save money to buy a house. The applicant and sponsor have discussed having children and travelling.
34. The Tribunal is satisfied that the applicant and sponsor have been in a long-term marriage relationship and intend to remain in the relationship. They provide companionship and emotional support, demonstrated by their combined work and personal lives.
35. The Tribunal finds the nature of the applicants and sponsors commitment to each other to be indicative of a couple in a marriage relationship.
36. Having considered the circumstances of the relationship as set out in r.1.15A(3), I am satisfied that at the time of this decision, the parties have a mutual commitment to a shared life to the exclusion of all others, they are in a genuine and continuing relationship, and they live together. Therefore at the time of application the parties meet the requirements for a spousal relationship within the meaning of s.5F(2)(b)-(d).
37. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant meets cl.801.221(2)(c).
38. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

39. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221(2)(c) of Schedule 2 to the Regulations

P. Maishman
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).